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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

PHILIP HARRY KOOLISH AND SARA ALLEN KOOLISH, INDIVIDUALLY AND TRADING AS STANDARD DISTRIBUTING COMPANY,

Petitioners,

v.

FEDERAL TRADE COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

HOMER CUMMINGS,
IRVIN H. FATHCHILD,
Counsel for Petitioners.

CUMMINGS & STANLEY,
Of Counsel.

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v.

FEDERAL TRADE COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Your petitioners, Philip Harry Koolish and Sara Allen Koolish, individually and trading as Standard Distributing Company, pray that writ of certiorari be issued to review a decree of the United States Circuit Court of Appeals for the Seventh Circuit, affirming and enforcing a cease and desist order of the Federal Trade Commission.

Opinion Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 118) is reported in 129 F. 2d 64.

Jurisdiction.

The opinion of the circuit court of appeals was filed and its order of affirmance entered on June 9, 1942 (R. 118, 120). Petition for rehearing was denied July 16, 1942 (R. 151) and the decree of the circuit court of appeals was entered the same day (R. 151-153). The jurisdiction of this Court is invoked under Section 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 719 as amended by the Act of March 21, 1938, c. 49, sec. 3, 52 Stat. 11 (15 U. S. C. sec. 45) and section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether the Federal Trade Commission may prohibit petitioners, distributors of standard merchandise, from supplying through the mails raffle cards or "push cards" which the recipients may or may not use in subsequent distribution of standard merchandise purchased from the petitioners where, as in this case:

(a) The Congress (1) by statute prohibiting the actual conduct of lottery transactions through the mails or through interstate commerce, and (2) by consistent rejection of proposed prohibitions, has made manifest its policy not to prohibit the movement through the mails or through interstate commerce of raffle cards or other chance devices whose regulation or prohibition has long been recognized to be a matter of local policy and practice to be effectuated by state and local regulation; and where, as here,

(b) such raffle cards or "push cards" have for a long period been mailed under a third-class permit validly issued

and validly continued in force by the Postmaster General in pursuance of the Postal Laws and Regulations and necessarily involving his administrative construction of the federal statutes as in no way prohibiting such cards from the mails.

2. Whether the circuit court of appeals erred in failing to hold that the Federal Trade Commission is without authority to enter a cease and desist order prohibiting the interstate distribution of standard merchandise with push cards which subsequently *may be used* in distributing such merchandise; or prohibiting interstate distribution of push cards which *may be used* in distribution of merchandise to the public.

3. Whether the circuit court of appeals, in sustaining the cease and desist order of the Federal Trade Commission, erred in failing to hold that there was no evidence to support the Commission's essential findings: (1) that many persons to whom petitioners, as part of their advertising literature, furnished push cards, subsequently use such cards in selling and distributing merchandise, and (2) that many persons are, by the element of chance, induced to buy and sell petitioners' merchandise in preference to merchandise offered for sale by competitors.

Statute Involved.

Section 5 of the Federal Trade Commission Act, September 26, 1914, c. 311, 38 Stat. 717, 719, as amended by Act of March 21, 1938, c. 49, sec. 3, 52 Stat. 111 (15 U. S. C. sec. 45), provides:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, ex-

cept banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406(b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

Statement.

The Federal Trade Commission has entered, and the Circuit Court of Appeals has affirmed, a cease and desist order which prevents petitioners from including in their sales promotion or advertising literature a push card which may or may not be utilized by the recipient as a raffle device in subsequently disposing of standard merchandise which he may own or buy from petitioners through an outright sale. The decision of the lower court that this constitutes an unfair method of competition by petitioners is based solely on a holding that the supplying of such free raffle cards was a practice contrary to the "established public policy of the United States." Because of ambiguities therein, certain of the findings of fact of the Commission can be rightly understood only by reference to the uncontradicted evidence. Briefly summarized, the findings and uncontradicted evidence show:

The petitioners sell and distribute in interstate commerce a large volume of merchandise including household wares and appliances, clothing, clocks, jewelry and cosmetics (R. 96). They also send through the United States mails circular letters each of which includes literature descriptive of this merchandise, an order blank and a simple and inexpensive raffle device commonly referred to as a push card (R. 96-97). As shown by the original exhibits, these mailings were under the third-class rate provisions. The third-class mailing privilege was under license granted

and continued in force under the Postal Laws and Regulations (1940) § 5.62 (39 C. F. R. § 5.63).

The sale of the merchandise from the petitioners to their customer is outright, neither on consignment or as agent and involves no element of chance (R. 80-81).[1] The petitioners retain no interest in, or control over, the merchandise or the raffle card after these pass into the hands of the customer. The customer upon his purchase of the merchandise becomes the absolute owner thereof and is free to use or dispose of it as he desires; if he determines to dispose of the merchandise, he may or may not use the raffle card, as he sees fit (R. 118). There is no question that the merchandise was fairly described, and represented fair value; it was sold with a money-back guaranty (R. 60, 66, 67, 72, 79, 80).

The evidence showed that petitioners do a large amount of business (R. 73, 81-83). However, the number, if any, that were attracted by the suggestion of the possibility of raffling off their purchases rather than by the attractive price at which the merchandise was sold, does not appear. Neither was there any evidence presented to show that even a single purchaser from respondent did raffle off merchan-

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[1] This reference to the evidence is essential to clarify Par. Five of the findings of the Commission (R. 99):

> "The sale of merchandise to the purchasing public according to respondents' sales plan involves a game of chance or the sale of a chance to procure an article of merchandise at a price much less than the normal retail price thereof. * * * The use by respondents of the aforesaid sales plan or method in the sale and distribution of their merchandise, and the sale of such merchandise by the aid of and through the use thereof, is * * * contrary to public policy" * * *.

It is clear that sale by petitioners involves no game of chance and that petitioners use no sales plan or method involving a game of chance. It would be correct to say that their sales plan involves the suggestion to the prospective purchaser of possible use of a chance device for subsequent distribution by him and the furnishing to him of such a chance device.

dise acquired from petitioners or did use push cards supplied by petitioners in doing so.[2]

The Commission's cease and desist order (R. 100-101) and the Court's decree confirming the same (R. 151-153) prohibit from interstate commerce not only the disposal of merchandise *by means of* push cards, punch boards or other chance devices (which petitioners do not do) (par. (3)); and not only the distribution of merchandise "*together with*" push cards, punch boards or other chance devices which may be used in distributing such merchandise (which petitioners do not do) (par. (1)); but as well the distribution of the push cards, punch boards, or other chance devices themselves (par. 2) "separately" (R. 101, 152 pars. 1, 2 and 3).

This last prohibition, i.e., against the distribution of push cards, punch boards and other chance devices 'separately" (par. (2) of the order and of the decree), contains the further clause reading "which push or pull cards, punch boards, or other lottery devices are to be used, or *may be used,* in selling or distributing such merchandise to the public."[3]

The affirmance of the order by the circuit court of appeals is grounded upon the broad proposition that here petitioners were supplying to others "means of conducting

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[2] In this respect, Paragraphs Four and Five of the Commission's findings (R. 99), aside from their misleading character, are without evidence in the record to support them and contrary to the holding of the court below (R. 119).

[3] Most, if not all, punch boards or other chance devices "may be" used in the distribution of merchandise upon a chance basis and accordingly this prohibition may fairly be considered as an attempt broadly to prohibit any distribution in interstate commerce of push cards, punch boards or other chance devices, whether distributed with merchandise or separately and independently thereof. This position was avowed by Commission's counsel in the oral argument in the circuit court of appeals and reflects the position taken in subsequently instituted proceedings now of public record before the Commission against manufacturers of push cards, punch boards and other chance devices. 2 C. C. H. Trade Reg. Serv. (8th ed.) ¶¶ 9972.24, 9972.50, 9972.88, 9977.63, 9978.58.

lotteries in the sale of merchandise'' and that this is ''contrary to the established public policy of the United States'' (R. 119).

Specification of Errors to be Urged.

The circuit court of appeals erred—

1. In holding that the Federal Trade Commission has jurisdiction to prevent the supplying—in the offering for sale in interstate commerce of standard merchandise or separately—of push cards or other means whereby the offeree, at his sole option, may subsequently distribute the merchandise locally on a chance basis.

2. In failing to hold that the established public policy of the United States includes no prohibition against supplying to others—in the advertising of standard merchandise, or separately—means such as push cards or raffle cards whereby the recipients may subsequently distribute merchandise by chance, where the merchandise is not by form, by method of packaging, or by agreement or other understanding with the vendees, committed to distribution on a chance basis or in a manner involving deception.

3. In failing to hold that there was no evidence to support the Commission's findings: (1) ''that many of the individuals, dealers, and others to whom respondents furnished said push cards have used, and do use, the same in purchasing, selling, and distributing merchandise which they buy from respondents''; and (2) ''Many persons are attracted by * * * the element of chance involved therein [in the push cards supplied] and are thereby induced to buy and sell respondents' merchandise in preference to merchandise offered for sale and sold by said competitors of respondents''.[4]

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[4] This error is not relied upon as a reason for granting the writ but is stated as a question presented, supra, p. 3, and will be briefed if the writ is granted.

4. In holding that under the Federal Trade Commission Act the Commission has authority to prevent the supplying to others through interstate commerce of (1) merchandise together with push cards that "may be used" in subsequently distributing such merchandise by chance and (2) push cards which "may be used" in distributing merchandise to the public by chance.

Reasons for Granting the Writ.

1. AN IMPORTANT QUESTION OF FIRST IMPRESSION IS HERE PRESENTED AS TO THE AUTHORITY OF THE FEDERAL TRADE COMMISSION UNDER THE FEDERAL TRADE COMMISSION ACT TO INVADE AND EXERCISE JURISDICTION IN A FIELD WHICH THE CONGRESS HAS REPEATEDLY INDICATED IS NOT TO BE REGULATED BY FEDERAL AUTHORITY.

The Commission here asserts authority to prohibit interstate commerce in push cards, punch boards and other raffle devices because they are susceptible of being used to distribute property upon a chance basis. This is but another in the series of attempts by that Commission to arrogate to itself jurisdiction beyond that conferred upon it by Section 5 of the Federal Trade Commission Act. Cf. *Federal Trade Comm.* v. *Gratz*, 253 U. S. 421; *Federal Trade Comm.* v. *Klesner*, 280 U. S. 19; *Federal Trade Comm.* v. *Raladam Co.*, 283 U. S. 643; *Federal Trade Comm'n* v. *Bunte Bros.*, 312 U. S. 349.

The position of the Commission is an unwarranted extension and misinterpretation of the decision of this Court in *Federal Tr. Comm'n* v. *Keppel & Bro.*, 291 U. S. 304. It is in disregard of the boundaries marking that area traditionally recognized by Congress and by this Court as peculiarly within the jurisdiction of state and local regulatory powers, and, as is shown by specific action of Congress, by it intended to remain free of federal regulation. The order

of the Commission in the exercise of this assertedly implied jurisdiction brings it into conflict with the exercise by the Postmaster General of the jurisdiction expressly delegated to him by the Congress and specifically exercised by him in this case.

(a) *The Federal Trade Commission has been given, and this Court has recognized in it no broad jurisdiction to impose any and all prohibitions upon interstate commerce which from time to time it may deem to be in the public interest.*——It is doubtful whether so broad a delegation of power would be valid. Delegation of unlimited power to prescribe codes "for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest" has been by unanimous decision held invalid because "instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them." *Schechter Corp. v. United States,* 295 U. S. 495, 541. In the same case, distinguishing that invalid grant of power from the powers conferred in the Federal Trade Commission Act, this Court said (p. 535):

> The authority sought to be conferred by § 3 was not merely to deal with "unfair competitive practices" *which offend against existing law,* and could be the subject of *judicial condemnation without further legislation,* or to create administrative machinery *for the application of established principles of law* to particular instances of violation. (Emphasis supplied.)

In recognition of this fundamental distinction, Congress in enacting the National Labor Relations Act did not broadly proscribe "unfair labor practices" and empower an agency to specify what those words were to include, but stated specifically what acts or practices are to be so regarded. 29 U. S. C. sec. 158. Similarly, in the Bituminous Coal Act the "unfair methods of competition" are carefully specified. 15 U. S. C. sec. 833 (i).

It is in the light of the limitations of these fundamental principles that the authority conferred by the Federal Trade Commission Act has by the Courts been construed and the constitutionality of the Act sustained against the charge of indefiniteness. In *Sears, Roebuck & Co.* v. *Federal Trade Commission,* 258 Fed. 307, 311, the first case in which the question was raised, the Act was held valid because it is to be understood as empowering the Commission to proceed against those acts which, under the substantive law of unfair competition, but irrespective of whether they have been specifically denounced in common-law cases, are subject to judicial condemnation as having "a tendency to injure competitors directly or through deception of purchasers". In *Federal Trade Comm.* v. *Gratz,* 253 U. S. 421, though not passing directly on the validity of the Act, this Court said that the words "unfair methods of competition" could not validly be held to apply to practices not within the purview of the anti-trust laws or not "characterized by deception, bad faith, fraud or oppression" (p. 427). And this Court accordingly held that "all questions of monopoly or combination being out of the way" and there having been no consumer deception, the practice there complained of was not within the jurisdiction of the Commission to proscribe (p. 428).

In *Federal Tr. Comm'n* v. *Keppel & Bro.,* 291 U. S. 304, the Commission obtained review of the conclusion of the lower court that there was "nothing in the petitioner's practices tending to hinder competition or create monopoly" and that "there is nothing in the case to show deception, fraud, or bad faith affecting its competitors or the ultimate consumer" (63 F. 2nd 81, 83). The subject matter there was candy packaged for the children's penny candy trade, the contents being specially arranged, marked and displayed for chance distribution.

In this Court the Commission relied principally on the *Gratz* case, *supra,* and *Federal Trade Comm.* v. *Winsted Co.,* 258 U. S. 483, both decisions clearly supporting the Commission's jurisdiction to prohibit consumer deception. The Commission stressed the position that asking the child to engage in a chance transaction was akin to deception.[5]

This Court adopted that position saying (291 U. S. 304, 309, 313):

> * * * the method of competition adopted by respondent induces children, too young to be capable of exercising an intelligent judgment of the transaction, to purchase an article less desirable in point of quality or quantity than that offered at a comparable price in the straight goods package * * *
> * * * we can perceive no reason for distinguishing between the element of chance *as employed here* and *the element of deception involved in labelling cotton goods "Natural Wool"* as in the *Winsted* case. (Emphasis supplied.)

There was evidence and the Commission found that "many manufacturers of competing candies refuse to engage in the distribution of the break and take type of package because they regard it as a reprehensible encouragement of gambling among children". This Court held that such a form of competition, requiring competitors either to descend to the distribution of such packages against powerful moral compulsion, or to lose business, was unfair.

But the only evidence adduced by the Commission in the instant case showed no moral restraints on the part of

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[5] It contended in its reply brief in that case, pp. 2-5, that "Inducing purchases by appealing to the cupidity and gambling instincts of children is assimilable to deception". The chance element does "not operate upon his purchasing judgment with normal effect." "The child would seem to be as much entitled to protection against an unfair sales practice in respect to penny candy as is the adult in respect to a woolen garment [in the Winsted Hosiery case]".

competitors [6] but rather that their objections were based on the "serious" or "annoying" competition offered by distribution by chance devices and the fact that in some cases much cheaper merchandise is supplied at the same price (R. 37, 39, 40, 45, 47).[7]

Neither has it been suggested that sale to children or any other equivalent of deception or unfair exploitation of the customer is involved in the ultimate chance distribution which occurs if petitioners' push cards are used by the recipient.

It is, therefore, on the facts and under the law, a far cry from the *Keppel* case now to hold that the Commission under its present grant of jurisdiction may prohibit your petitioners or other distributors from supplying their customers with raffle cards. While this Court observed in the *Keppel* decision that the practice there involved was of the sort "which the common law and criminal statutes have long deemed contrary to public policy" (p. 313), the Court did not profess to declare, as did the court below in this case, that the supplying to others of the "means" for the distribution of property upon a chance basis is "contrary to the established public policy of the United States" (R. 119).

(b) *On the facts, exercise of jurisdiction by the Commission in this case is without support, implied or otherwise, either in the rule of the Keppel case, or in the subsequent*

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[6] It is established that large sectors of the population recognize no inherent immorality in raffles or any other game of chance (6 Encycl. Soc. Sci., pp. 557-558; 6 Catholic Encyclopaedia, p. 375).

[7] There was no suggestion of how the use of chance devices in the secondary distribution of merchandise lends itself more readily than does any other method of mail-order selling to the "gypping" of the public concerning which the witness generalized (R. 46). Indeed, petitioners' merchandise was shown to be sold with a money-back guarantee and at prices comparing very favorably with those at which the same or similar merchandise was regularly sold by others (R. 60, 66, 67, 72, 79, 80).

federal decisions which have applied it.——Since the decision of this Court in the *Keppel* case, where the jurisdictional determination of the circuit court of appeals was reversed (see p. 11, supra) the Commission has extended its asserted jurisdiction to situations where jurisdiction was admittedly less clear than that which appeared from the findings and decision in that case. In a number of them this court, without ruling on the merits, has denied certiorari.[8]

But the jurisdiction here asserted by the Commission goes beyond that involved in any of the previously adjudicated cases. The Commission so recognized in its brief in the court below;[9] and the circuit court of appeals also recognized the factual differences from the case cited as authority by it (R. 118).

In the previous cases the merchandise was, at point of shipment, *committed* to distribution upon a chance basis either (1) by special assembly, packing and marking as in the "break and take" cases; or (2) by *commitment* with the local distributor as in *Chicago Silk Co.* v. *Federal Trade Commission,* 90 Fed. 689 (C. C. A. 7). The opinion of the circuit court of appeals in the instant case recognized that in that case " the money for the purchase of the goods was *transmitted after collection by the push card method*". In that case, as the record confirmed and as the court recognized, the push card recipient became in fact and in law the *distributing agent* of the manufacturer. Where he sold the chances he was obviously committeed to pro-

[8] *Hofeller* v. *Federal T. C.,* 82 F. 2nd 647, cert. denied, 299 U. S. 557; *Federal Trade Commission* v. *A. McLean & Son,* 84 F. 2nd 910, cert. denied, 299 U. S. 590; *Federal Trade Commission* v. *F. A. Martoccio Co.,* 87 F. 2nd 561, cert. denied, 301 U. S. 691; *Chicago Silk Co.* v. *Federal Trade Commission,* 90 F. 2nd 689, cert. denied, 302 U. S. 753; *National Candy Co.* v. *Federal Trade Commission,* 104 F. 2nd 999, cert. denied, 308 U. S. 610.

[9] "It is true that no case with facts exactly like this one has previously reached the courts". Commission's Brief before the Court of Appeals in the instant case, p. 20.

ceed with the transaction by (1) collecting the proceeds, and (2) transmitting the proceeds to the manufacturer; (3) having the manufacturer send the merchandise pursuant to the commitment with the local distributor and the chance purchasers and then (4) distributing the merchandise upon a chance basis pursuant to his commitments with the manufacturer and with the chance purchasers. *That situation was within the very express prohibition of Congress* against the *actual conduct* of lottery transactions through federal channels. (See p. 15, infra.)

In the instant case the situation is fundamentally different. Here the merchandise is, of course, standard merchandise and there is no commitment, or arrangement, tacit or otherwise, by the shipper at the time of shipment or at any other time that the merchandise be distributed locally on a chance basis. The Commission in its brief before the lower court (p. 8) stated that when the customers purchase the merchandise from petitioners "it becomes their property, to keep or to dispose of as they see fit." The court recognized that "petitioners have no control of the mode of distribution after the goods leave their hands" (R. 119), and the raffle card sent in the earlier mailing enclosure, "may or may not" be used for distribution of any of the standard merchandise so purchased (R. 118).

It is, therefore, obvious that on the facts, neither the decision in the *Keppel* case nor any of the decisions which have since purported to follow it, may be regarded as precedent for this newest attempt to broaden the jurisdictions of the Commission beyond its delegated field.

c. *The basic position that it is "contrary to the established public policy of the United States" to place in the hands of others the means whereby property may be disposed of upon a chance basis, is palpably erroneous.*—The Constitution has vested in "The Congress", not in the

federal judiciary, the power "To regulate Commerce" and "To establish Post Offices and post Roads" (Art. 1, sec. 8). It is accordingly for "Congress" to say "what constitutes public policy in all matters confided to it by the Constitution or law". *Baker* v. *United States,* 27 F. 2d 863, 875, and cases cited. That this is particularly true in the subject matter here considered has been squarely decided in *The License Tax Cases,* 5 Wall. 462, where the Court said (p. 469):

> There are cases, it is true, in which arguments drawn from public policy must have large influence; but *these are cases in which the course of legislation and administration do not leave any doubt upon the question what the public policy is,* and in which what would otherwise be obscure or of doubtful interpretation, may be cleared and resolved by reference to what is already received and established.
>
> *The cases before us are not of this sort.* The legislature [Congress] has thought fit, by enactments clear of all ambiguity, *to impose penalties for unlicensed dealing in lottery tickets* and in liquors. These enactments, so long as they stand unrepealed and unmodified, *express the public policy in regard to the subject of them.* (Emphasis supplied.)

(1) The policy of Congress has been clearly manifested. It has prohibited the *actual conduct* of lottery transactions through interstate commerce or through the mails. Act of March 4, 1909, c. 321, secs. 213, 237, 35 Stat. 1129, 1136 (18 U. S. C. secs. 336, 387); see *Francis* v. *United States,* 188 U. S. 375.

More important, and highly significant, is the fact that Congress has consistently rejected and refused to enact numerous bills which, like the order of the Commission here, would have prohibited the movement through the mails or through interstate commerce of chance devices broadly and variously referred to in such proposals as

"chance" or "lottery" or "gambling" devices.[10] Cf. *In re Amtorg Trading Corporation*, 75 F. 2d 826, 832. This policy rests upon the position expressed by the present Administration in recommending the rejection of H. R. 4796, 75th Congress, as follows:

> As a matter of general policy, it appears highly doubtful whether the Federal Government should undertake to legislate on the subject of transportation of gambling devices, instead of leaving the matter to State and local regulation.
>
> I am informed by the Acting Director of the Bureau of the Budget that this legislation is in conflict with the program of the President. (Letter, April 21, 1937 from Attorney General Cummings to Hon. Hatton W. Sumners, Chairman, House Judiciary Committee).

(2) The underlying reason for this policy was recognized and applied by this Court in interpreting the Federal Trade Commission Act in *Federal Tr. Comm'n* v. *Bunte Bros.*, 312 U. S. 349, 354, where the Court said:

> The construction of § 5 urged by the Commission would thus give a federal agency pervasive control over myriads of local businesses in matters *heretofore traditionally left to local custom or local law.* Such control bears no resemblance to the strictly confined authority growing out of railroad rate discrimination. As inroad upon *local conditions* and *local standards* of such far-reaching import as is involved here, ought to await a clearer mandate from Congress. (Emphasis supplied.)

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[10] Among the rejected bills are:

S. 1541, 66th Cong.
S. 1543, 66th Cong.
H. R. 11954, 66th Cong.
H. R. 6071, 68th Cong.
H. R. 3935, 69th Cong.
H. R. 4004, 69th Cong.
H. R. 387, 70th Cong.
S. 1446, 71st Cong.
H. R. 2408, 71st Cong.
S. 182, 72nd Cong.
H. R. 353, 72nd Cong.
H. R. 7537, 72nd Cong.
S. 2570, 73rd Cong.
S. 3076, 73rd Cong.
S. 2559, 73rd Cong.
S. 6, 74th Cong.
H. R. 4796, 75th Cong.
H. R. 7464, 76th Cong.

(3) But the evidences of public policy in this matter as by Congress established and administratively applied are affirmative as well as negative. The whole basis of action by the Commission is that the "petitioners supplied to and placed in the hands of others, *means* of conducting lotteries in the sale of merchandise" (R. 119). But such supplying was through the United States mails *in accordance with positive and affirmative administrative determination that Congress* has manifested an intent that the mailing or interstate movement of the *means* whereby properties may be disposed of upon a chance basis *shall not be prohibited.* The court below has expressly recognized that as a class raffle cards such as those here involved validly pass through the United States mails. In *Schreiber* v. *United States,* 129 F. 2d 836 (C. C. A. 7) the court said (p. 837):

> Appellees are engaged in the business of manufacturing and selling certain types of cards known as "push-cards" and "pull-cards" which are used for raffling merchandise. * * *
>
> In 1933, in response to an inquiry from one of the appellees, addressed to the United States Post Office in Chicago, regarding the classification of the cards, the Acting Postmaster notified him *that the cards would be mailable* in unsealed parcels at the third or fourth-class rate when bearing the printed inscription on the outside including the name of the manufacturer or dealer. He commented on the fact that it was noted that the sales cards were to be sold outright and that *appellee's concern retained no interest in their operation after sale to the addressee.*

Petitioners' raffle cards, in particular, pass through the mail in compliance with the Postal Laws and Regulations. As is shown by the push-cards or raffle-cards filed as exhibits in this case and the envelopes in which mailed, they are accepted as third-class matter under "Permit No. 3121" issued by the Postmaster General under Postal Laws

and Regulations, Sec. 562, in the exercise of his jurisdiction "to execute all laws relative to the Postal Service." The regulations under which said permit was issued, and is continued in force, provide for right of examination of the contents and that specimens of "each mailing shall be examined upon receipt at the post office as will enable the receiving employees to ascertain that the particular mailing is from an authorized permit holder (that the rate privileges are complied with) * * * and *that the matter otherwise complies with postal requirements.*" [11]

We submit that where, as here, Congress has made clear its purpose that the "means" for chance distribution shall not be barred from the mails, and where, as here, the powers and duties to "execute all laws relative to the Postal Service" have been vested in the "Postmaster General" and that officer has knowingly issued and continues in force said mailing permit, it cannot reasonably be contended that the jurisdiction of the Federal Trade Commission is *by implication* to be regarded as including power to override that *manifest* determination of Congress and that *express* delegation of power to the Postmaster General and *his official action* in transmitting petitioners' raffle cards through the mails. Cf. *Federal Tr. Comm'n* v. *Bunte Bros.*, 312 U. S. 349.

In short, we submit the Federal Trade Commission may not by any process of attenuated inference in effect nullify the permit which the Postmaster General has issued.

(4) The assertion of an extra- (and in this case a contra-) statutorial public policy is inconsistent also with the com-

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[11] Judicial notice, of course, may be taken of the Regulations of the Post Office Department. *Deal* v. *United States*, 11 F. 2nd 3; *Petersen* v. *United States*, 287 Fed. 17; *Bruce* v. *United States*, 202 Fed. 98. The above quotation is from official forms for applications for license and from conditions stated in the license.

mon law classification of this subject matter as at most, *"malum prohibitum"* and not *"malum in se."* *In re Rapier*, 143 U. S. 110, 134; *People* v. *Monroe*, 349 Ill. 270, 275; *Fleming* v. *Foy*, 9 Fed. Cas. No. 4,862 at 263. Referring to *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, this Court said (*Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, 496):

> our federal system * * * leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. *It is not for the federal courts to thwart such local policies by enforcing an independent "general law"* (emphasis supplied).

But if the federal courts are to be left free to affect the rights of individuals by reference to some vague transcendent "public policy of the United States" it would appear that in the *Tompkins* case we have merely discarded the certainties of "federal general law" for the treacherous and elusive vaguities of a "federal public policy." "Public policy of the United States," unless clear and unquestioned, is not for the courts but for the Congress to declare.

Nor can this asserted "established public policy of the United States" be sustained on the theory of a uniform public policy among the States in this subject matter.—The policies in the several States are different and, significantly, the trend is away from the austere prohibitionism of a generation or two ago.

Thus the Illinois Supreme Court has recently said in *Albers, Receiver*, v. *Hanson*, 380 Ill. 35, 42-43, that until the Horse Racing Act of 1927 "gambling in general was regarded as contrary to the public policy of this State" but "The Horse Racing Act has made it clear that that public

policy is no longer in existence,"[12] Push cards and punch boards are freely used in many parts of the United States to such an extent that the present National Administration, under the National Industrial Recovery Act, approved a "Code of Fair Competition for Punch Board Manufacturing Industry"—Code No. 316. Even "slot-machines," extensively used in many states, are being realistically taxed by the Federal Government on a basis of revenue and not of prohibition. Internal Revenue Code, sec. 3267. The State of Nevada, by an Act approved March 19, 1931, and commonly referred to as the "Open Gambling Law," (Nevada Laws 1931, p. 165) has broadly legalized and licensed gambling upon the policy that, as with the liquor problem, regulation may be better than prohibition.[13]

It is not irrelevant to note that, adopting the realistic attitude which now characterizes the American attitude toward the liquor industry, the British Government, in 1932, appointed a Commission "to enquire into the existing law and the practice therein relating to lotteries, betting, gambling and cognate matters and to report what changes, if any, are desirable and practicable." The Report, a printed publication of some 180 pages, recognizes that existing statutory enactments are "archaic" and out of line with accepted social practice (Report of the Royal Commission on Lotteries and Betting, June, 1933, p. 70). It recognizes, also, that here is a social problem which must be faced realistically; and concludes that serious social consequences

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[12] Horse racing and betting thereon, a common and respected social practice in earlier years, was later prohibited in practically every State of the union, but since 1926 more than thirty states have again legalized this practice. The following list of such statutes is illustrative, not exhaustive: *New York*, Laws 1926, c. 440 and Laws 1934, c. 233; *Illinois*, Laws 1927; *California*, Laws 1933, c. 436; *Massachusetts* (p. 28), Laws 1934, c. 374; *Arizona*, Laws 1935, c. 79; *Florida*, Laws 1931, c. 14832; *Michigan*, Laws 1933, Act No. 199; *Ohio*, Laws 1933, p. 367; *Oregon*, Laws 1935, c. 244; *Washington*, Laws 1933, c. 55.

[13] See *State ex rel.* v. *Dunkle*, 53 Nev. 357, 1 Pac. (2d) 108.

are, as in the case of smoking or drinking, largely from *over* indulgence. The Report suggests, as a legislative policy, that "the general aim of the State in dealing with facilities for organized or professional gambling should be to prohibit or place restrictions upon such facilities and such facilities only as can be shown to have serious social consequences if not checked"; and that "in framing legislation with those objects in view, we regard it as of the utmost importance that not more prohibitions should be made than are absolutely necessary. Every new prohibition creates a new class of potential offenders."

All this emphasizes that the principle of "public policy" "must be cautiously applied to guard against confusion and injustice." *Steele* v. *Drummond*, 275 U. S. 199, 205. For, as this Court forcefully pointed out in *Patton* v. *United States*, 281 U. S. 276, 306:

> The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection. The public policy of one generation may not, under changed conditions, be the public policy of another.

2. THE DECREE OF THE COURT BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS

In *Federal Tr. Comm'n* v. *Keppel & Bro.*, 291 U. S. 304, as will appear from the record in this Court, the Commission's order was against "selling and distributing * * * candy so packed and assembled that sales of such candy to the general public *are* by means of a lottery, gaming device, or gift enterprise." In a subsequent case the Commission enlarged its order to read "candy so packed and assembled that sales to the general public are to be

made or *may be* made by means of a lottery, gaming device or gift enterprise."

It was pointed out that *any* candy howsoever packed or assembled "may be" made upon a chance basis and the extension of the order injected at least an ambiguity which might be oppressively applied. The manufacturer, at point of shipment, knows that many of his products "may be" distributed at point of destination upon a chance basis and to issue an order which might be interpreted and applied as requiring him to follow his merchandise to point of destination and there to control its ultimate disposition would be an unreasonable and burdensome restriction upon interstate commerce.

In *Federal Trade Commission* v. *A. McLean & Son,* 84 F. 2d 910 (C. C. A. 7), the court directed that the order be modified and that in lieu of the objectionable words "may be", there be substituted the words "are designed to be." (913)

There is conflict on this point, as clearly stated in the recent decision of *Lee Boyer's Candy* v. *Federal Tr. Comm'n,* 128 F. 2d 262 (C. C. A. 9) as follows:

> Other paragraphs of the order—paragraphs (2), (3) and (4)—are not here challenged. As to paragraph (1), petitioner's only objection is to the phrase "or may be made." This phrase, petitioner contends, makes the order too broad.
>
> Supporting petitioner's contention are: *Helen Ardelle, Inc.* v. *Federal Trade Commission,* 9 Cir., 101 F. 2d 718; *Federal Trade Commission* v. *A. McLean & Son,* 7 Cir., 84 F. 2d 910; *Federal Trade Commission* v. *Charles N. Miller Co.,* 1 Cir., 97 F. 2d 563; *Sweets Co.* v. *Federal Trade Commission,* 2 Cir., 109 F. 2d 296.
>
> Opposed are: *National Candy Co.* v. *Federal Trade Commission,* 7 Cir., 104 F. 2d 999; *Ostler Candy Co.* v. *Federal Trade Commission,* 10 Cir., 106 F. 2d 962; *Hill* v. *Federal Trade Commission,* 5 Cir., 124 F. 2d

104; *Kritzik* v. *Federal Trade Commission*, 7 Cir., 125 F. 2d 351.

We are asked by the Commission to overrule our decision in *Helen Ardelle, Inc.* v. *Federal Trade Commission*, supra. This we decline to do; for, although some courts have refused to follow it, we still believe our decision was correct.

The order is modified by striking from paragraph (1) thereof the phrase "or may be made."

It is to be noticed that in the *Boyer* case the Court has not made *substitution* for the words "or may be made" but has *stricken* them; thus, in effect reinstating the order in the scope and form approved in the *Keppel* case.

The issue, which in the above cases was only of secondary importance, is here the very crux of the controversy. In those cases the merchandise was specially prepared, packed and marked so that it was *committed* to distribution, i.e. was "designed to be" distributed on a chance basis as the order was modified in the *McLean* case. The merchandise in the instant case is not *committed* to chance distribution either by the arrangement, assembly and marking as in the candy cases or by commitment with the distributor, as in the *Chicago Silk Co.* v. *Federal Trade Commission*, 90 F. 2d 689, which the court below sought to distinguish (R. 118).

We submit that the conflict in decisions is not only significant in and of itself but emphasizes the importance of our first ground for certiorari, *viz.* that here in the substance of the case the Commission is seeking to extend its jurisdiction by mere inference to situations not within the facts of the previously adjudicated cases and in conflict with the manifest policy of Congress and with the Congressionally-recognized reserved rights of the States and with the exercise of the expressly delegated duties and powers of the Postmaster General as hereinbefore discussed in Point I.

Conclusion.

If the position of the circuit court of appeals is to be sustained, viz., that to "supply to or place in the hands of others" any and all "means" whereby property may be disposed of upon a chance basis is "contrary to the established public policy of the United States" (R. 119), then the Federal Trade Commission will have been recast in the role of a sort of national censorship bureau—a function for which it is neither manned nor funded and for which its procedure of case-by-case cease and desist orders is wholly unsuited.

This Court has announced and again and again confirmed that "It is for the Courts, not the Commission, ultimately to determine, as a matter of law" what constitutes an "unfair method of competition" under the Act. *Federal Trade Comm.* v. *Gratz,* 253 U. S. 421, 427. But as a result of the Commission's persistent insistence that it is proceeding under the mandate of this Court in the *Keppel* case, the lower courts, particularly the Seventh Circuit, appear to have become imbued with the view that any interpretation of "public policy" by them which would narrow the breadth of asserted jurisdiction would not be sustained in this Court. As a result, and as appears from the opinion of the court below, but slight consideration is now given to the question of public policy *vel non.*

Upon the theory confirmed by the court in the instant case and by individual cease and desist proceedings, the Commission is now asserting power to prevent the supplying of all "means" and the supply of all property whereby chance transactions may be carried on locally.

Certainly the *Keppel* case was not intended by this Court to become the touchstone for unlimited power which the Commission has sought to make it. The benefits to be derived, both by the lower courts and by business generally,

from a further definition of the rule there laid down abundantly recommend the favorable consideration of this petition.

Wherefore it is respectfully submitted that this petition for a writ of certiorari should be granted.

HOMER CUMMINGS,
IRVIN H. FATHCHILD,
Counsel for Petitioners.

CUMMINGS & STANLEY,
Of Counsel.

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